

E-Filed 1/15/09

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

DAVID HO, et al.,

Plaintiffs,

v.

ERNST & YOUNG LLP,

Defendant.

Case Number C 05-4867 JF (HRL)

ORDER¹ DENYING DEFENDANT'S
MOTION FOR SUMMARY
JUDGMENT AND SETTING CASE
MANAGEMENT CONFERENCE

Defendant Ernst & Young LLP ("E&Y") seeks summary judgment with respect to the claims of Plaintiff Sarah Fernandez ("Fernandez"). The Court has considered the briefing submitted by the parties as well as the oral arguments of counsel presented at the hearing. For the reasons discussed below, the motion will be denied.

I. BACKGROUND

This putative class action was filed in the Santa Clara Superior Court on September 27, 2005, asserting claims for unpaid overtime wages on behalf of E&Y employees who were classified improperly as exempt from overtime pay under California law. After the action was

¹ This disposition is not designated for publication in the official reports.

1 removed by E&Y to this Court, the operative first amended complaint (“FAC”) was filed on
 2 behalf of four named plaintiffs: Fernandez, David Ho (“Ho”), John Maxton (“Maxton”), and
 3 Nathan Lay (“Lay”). The Court subsequently granted summary judgment for E&Y with respect
 4 to Ho’s claims, and approved the parties’ stipulated dismissal of Maxton and Lay; only
 5 Fernandez’s claims remain.

6 Fernandez holds a degree in accounting from California State University, Long Beach.
 7 Prior to graduation, she worked for E&Y as an intern in the summer of 2003. In September
 8 2004, following graduation, she started as a “staff 1” in E&Y’s Assurance and Advisory Business
 9 Services (“AABS”) group. At that time she was twenty-three years old, and her starting salary
 10 was \$41,000.² The description of AABS staff positions read in part as follows: “Will serve as
 11 members of multiple client engagement teams which primarily assist in performing audits of
 12 financial statements as well as often being involved with providing other assurance services that
 13 include: reviews, compilations, special reports, SEC compliance, debt compliance, comfort
 14 letters, reviews of interim data, internal control reviews, and regulatory and other compliance
 15 reporting.” Declaration of Bin Wolfe, Exh. A, Position Description. At all relevant times,
 16 employees in the AABS group were organized into the following positions, in ascending order:
 17 staff 1, staff 2, senior 1, senior 2, senior 3, manager, senior manager, executive director, and
 18 partner/principal. Wolfe Decl. at ¶ 4.

19 Fernandez initially received positive performance reviews and was promoted to “staff 2.”
 20 However, after this initial period, her reviews reflected concerns about tardiness and excessive
 21 time spent on personal instant messaging, sidekick sametime, and email. On July 13, 2005,
 22 Fernandez was given a performance improvement plan specifying that she was to: limit her use
 23 of personal instant messaging, sidekick sametime, and email; concentrate on finishing
 24 assignments on time; ask for additional work when she finished a project; and arrive to client
 25 locations on time. Declaration of Gregory Knopp, Exh. 3, Performance Improvement Plan.

27 ² There is some discrepancy in the record as to whether Fernandez’s starting salary was
 28 \$41,000 or \$45,000; this discrepancy is immaterial to the present analysis.

1 Fernandez admits that although she tried to comply with the plan at first, after a few months she
 2 no longer tried. Knopp Decl., Exh. 1, Fernandez Depo., 208:13-25. Fernandez conceded that
 3 eventually she was “just doing whatever was necessary to get by.” *Id.* 219:8-10. Fernandez was
 4 fired in July 2006.

5 Fernandez claims that she was misclassified as a salaried employee exempt from
 6 California’s wage and hour laws, and that in fact she is entitled to overtime pay. She sues on
 7 behalf of herself and all similarly situated E&Y employees for: (1) unpaid overtime wages under
 8 California Labor Code § 1194; (2) unlawful business practice in violation of California Business
 9 & Professions Code § 17200; (3) statutory interest on unpaid wages under California Labor Code
 10 § 218.6; (4) waiting penalties under California Labor Code § 203; and (5) wages for worked
 11 break time under California Labor Code § 226.7. E&Y seeks summary judgment on the basis
 12 that Fernandez was classified properly as an exempt employee.

13 II. LEGAL STANDARD

14 A motion for summary judgment should be granted if there is no genuine issue of
 15 material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
 16 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The moving party bears
 17 the initial burden of informing the Court of the basis for the motion and identifying the portions
 18 of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that
 19 demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S.
 20 317, 323 (1986).

21 If the moving party meets this initial burden, the burden shifts to the non-moving party to
 22 present specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e);
 23 *Celotex*, 477 U.S. at 324. A genuine issue for trial exists if the non-moving party presents
 24 evidence from which a reasonable jury, viewing the evidence in the light most favorable to that
 25 party, could resolve the material issue in his or her favor. *Anderson*, 477 U.S. 242, 248-49;
 26 *Barlow v. Ground*, 943 F. 2d 1132, 1134-36 (9th Cir. 1991).

27 III. DISCUSSION

28 Subject to certain exceptions, California Labor Code § 510 requires overtime pay for

1 “[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any
 2 one workweek and the first eight hours worked on the seventh day of work in any one
 3 workweek.” Cal. Lab. Code § 510(a). The Industrial Welfare Commission (“IWC”) is
 4 empowered to establish exemptions from the general overtime requirement. Cal. Lab. Code §
 5 515(a). At issue in this case is the administrative exemption established by the IWC in Wage
 6 Order 4-2001, codified at Cal. Code Regs., tit. 8, § 11040.³ As relevant here, the administrative
 7 exemption applies to any employee: (1) whose duties involve “[t]he performance of office or
 8 non-manual work directly related to management policies or general business operations of
 9 his/her employer or his employer’s customers”; (2) “[w]ho customarily and regularly exercises
 10 discretion and independent judgment”; (3) “[w]ho performs under only general supervision work
 11 along specialized or technical lines requiring special training, experience, or knowledge” *or*
 12 “[w]ho executes under only general supervision special assignments and tasks”; and (4) “[w]ho is
 13 primarily engaged in duties that meet the test of the exemption.” 8 Cal. Code. Regs.
 14 11040(1)(A)(2)(a)-(f). The employee also must earn a monthly salary equivalent to at least twice
 15 the state’s minimum wage for full-time employment. 8 Cal. Code Regs. 11040(1)(A)(2)(g).

16 There is no dispute that the salary element is met in this case. The Court thus turns its
 17 attention to the first four elements listed above.

18 The undisputed evidence in the record establishes that the first element is met, that is, that
 19 Fernandez performed office work directly related to the business operations of E&Y and its
 20 customers. Section 11040 expressly incorporates provisions of the Code of Federal Regulations
 21 defining such work to include “work in functional areas such as tax; finance; accounting;
 22 budgeting; auditing” *See* 8 Cal. Code Regs. §11040(1)(A)(2)(f); 29 C.F.R. § 541.201(b)
 23 (West 2006); *see also* §§ 541.201(c) (stating that tax experts or financial consultants may be
 24 administratively exempt), 541.203(b) (West 2006) (stating that employees in the financial

25
 26 ³ At page one of its opening memorandum of points and authorities, E&Y asserts that
 27 Fernandez is both administratively and professionally exempt from California’s overtime
 28 requirements. However, E&Y does not thereafter address the professional exemption in the body
 of the memorandum; nor is the professional exemption addressed in the reply. Accordingly, the
 Court addresses only the application of the administrative exemption.

1 services industry generally meet the duties requirements for the administrative exemption). The
 2 Court has no difficulty concluding as a matter of law that Fernandez performed the type of work
 3 required under the first element.

4 However, the evidence is in conflict as to the degree to which Fernandez exercised
 5 independent judgment and worked under only general supervision (second and third elements
 6 above), and as to the amount of time Fernandez spent performing work that meets the test of the
 7 exemption (fourth element above).

8 **A. Degree To Which Fernandez Exercised Independent Judgment And Worked Under**
 9 **Only General Supervision**

10 As the moving party, E&Y has the initial burden of demonstrating that Fernandez
 11 satisfies the requirements that she exercised independent judgment and worked under only
 12 general supervision. E&Y relies upon Fernandez's deposition testimony with respect to certain
 13 of her assignments. For example, Fernandez testified that with respect to one client, she went
 14 through the expenses of individuals on the Board of Directors to ensure that "they weren't
 15 expensing over a certain amount and that the expenses seemed reasonable, that they weren't for
 16 like things that just shouldn't be expensed on the business." Fernandez Depo. 119:18-23.
 17 Fernandez testified that the manager "basically gave me like a general guideline and just used
 18 normal, you know, logic" to identify expenses "that any normal person would expect not to –
 19 shouldn't be charged to a business." *Id.* at 120:4-9.

20 E&Y points to Fernandez's testimony regarding "footing and tying" another client's SEC
 21 filing. Fernandez testified that "I had to add every number column or row and make sure – I had
 22 to test their – if they said there were certain ratios, I had to recalculate the ratios, and then I had to
 23 get the working papers from [the client's] file and just make sure the numbers came – to show
 24 that the numbers came from that worksheet then look to the financial statement, that the numbers
 25 that the team had tested were exactly being illustrated on the 10K." *Id.* at 108:25 - 109:7. If
 26 Fernandez found any anomalies, she was to flag them and let her senior know there was a
 27 problem. *Id.* at 109:18-21.

28 E&Y also cites Fernandez's testimony that she did "drop and counts" for two weeks at a

1 client's facility in Las Vegas. Fernandez testified that a "drop and count" is "when you go and
2 watch in the surveillance room, you watch the money counters collect all the money from the –
3 cash from the tables and the coins, and then you watch them count them from the room." *Id.* at
4 93:15-19. The purpose is to verify that the numbers stated at the end of the day are correct. *Id.* at
5 93:20-22. Fernandez was the only E&Y employee present for that particular assignment. *Id.* at
6 94:12-16.

7 E&Y asserts that Fernandez's testimony and other evidence is sufficient to meet E&Y's
8 initial burden to show that Fernandez exercised independent judgment and worked under only
9 general supervision. The Court is not persuaded that such characterizations necessarily follow
10 from the evidence. But even assuming for purposes of this motion that E&Y has met its initial
11 burden, Fernandez presents her own declaration statements⁴ to clarify her deposition testimony
12 and to show that in fact she did not regularly exercise independent judgment or work under only
13 general supervision. For example, Fernandez states that with respect to the first assignment
14 referenced above (reviewing board members' expenses), she was directed to report to her
15 superiors any expenses that exceeded specific guidelines she had been given or that seemed to be
16 abnormal business expenses. Fernandez Decl. ¶ 23. She herself did not make any decision as to
17 whether any of the expenses were or were not proper business expenses; those determinations
18 were made by her superiors. *Id.* Fernandez states that despite these restrictions, that particular
19 assignment actually gave her more responsibility than usual, because she was permitted to assist
20 with "characterization" of client data, while for the most part she was given assignments
21 involving "verification" that the clients' numbers added up and were documented properly. *Id.* at
22 ¶ 24.

23
24
25 ⁴ E&Y objects to portions of Fernandez's declaration as irrelevant, lacking foundation
26 and personal knowledge, and conflicting with her prior deposition testimony. The objection is
27 overruled. The portions of the declaration relied upon by the Court are relevant and based upon
28 Fernandez's personal experience at E&Y. There is no direct conflict between these portions of
the declaration and Fernandez's prior deposition testimony. Fernandez moves to strike E&Y's
objection on various grounds. Given the Court's ruling with respect to the objection, the motion
to strike is denied as moot.

1 With respect to the “drop and counts” assignment in Las Vegas, Fernandez states in her
2 declaration that her job consisted of “12 hour shifts of observing casino employees count cash in
3 the cash counting room.” *Id.* at ¶ 18. She was to report any instances in which an employee
4 pocketed cash or otherwise failed to count cash properly. *Id.* She did not observe any such
5 conduct. *Id.* She personally counted certain cash bundles to confirm that the amount of such
6 bundles had been accurately reported. *Id.* Although Fernandez was the only E&Y employee
7 present during these shifts, her superiors decided to what extent the employee counts should be
8 observed and how many counts Fernandez personally should make. *Id.*

9 Fernandez states that for the most part she performed footing and tying work, which
10 consisted of matching up financial data that already had been characterized by the client, and
11 reporting any numbers that did not match. *Id.* at ¶ 19. She also prepared comfort letters for her
12 superiors’ signature; those were form letters containing standard language. *Id.* at ¶ 21. She states
13 explicitly that she was not given responsibility for determining the scope of the audits, making
14 audit conclusions, or making decisions about whether errors in client information were material.
15 *Id.* at ¶ 2. She characterizes her job as similar to reconciling a bank statement against a
16 checkbook ledger. *Id.* at ¶ 4.

17 Fernandez also points to other portions of her deposition testimony in support of her
18 position. For example, Fernandez testified that the training she received for her Staff I (salaried)
19 position was the same training as that she received for her intern (hourly non-exempt) position.
20 Fernandez Depo. 245:8-14. In addition, she testified as to her limited involvement and lack of
21 independence with respect to various projects on which she worked. *See, e.g., id.* at 66:1-10,
22 69:20-25, 86:6-20, 100:17-25.

23 Fernandez’s declaration statements and deposition testimony are sufficient to create a
24 triable issue of material fact as to the degree of independent judgment Fernandez exercised and
25 the amount of supervision given her. A triable issue of material fact thus exists as to whether she
26 came within the administrative exemption during her employment with E&Y.

B. Amount Of Time Fernandez Spent Performing Work That Meets The Test Of The Exemption

Because triable issues of material fact exist as to the two elements of the administrative exemption discussed above, the Court need not reach the question of whether Fernandez was “primarily engaged in duties that meet the test of the exemption” while at E&Y. *See* 8 Cal. Code. Regs. 11040(1)(A)(2)(f). Nonetheless, the Court will address this element briefly. The “primarily engaged” element has been construed to require that the employee spend at least fifty percent of his or her time on work that meets the test of the exemption. *See Combs v. Skyriver Communications, Inc.*, 159 Cal. App. 4th 1242, 1267 (2008). In analyzing this element, the Court must consider both how the employee actually spends his or her time *and* whether the employee’s conduct diverges from the employer’s realistic expectations. *Ramirez v. Yosemite Water Co., Inc.*, 20 Cal. 4th 785, 802 (1999) (discussing a different wage order containing a similar requirement that the employee spend more than fifty percent of his or her time on specified duties). An employee that “falls below the 50 percent mark due to his own substandard performance should not thereby be able to evade a valid exemption.” *Id.*

E&Y argues that Fernandez spent at least fifty percent of her time on duties falling within the exemption, and that any failure to meet this element was due to Fernandez’s own substandard performance. E&Y submits substantial evidence that Fernandez’s performance in fact was substandard, including her own deposition testimony that she did just enough to get by, regularly was late, and on one occasion failed to report to work until nearly lunchtime because she had gone to Mexico for the weekend. Fernandez Depo. 219:8 - 221:23. It is apparent that Fernandez was a less than exemplary employee. However, it simply is not clear from this record whether her position, performed as legitimately expected by E&Y, met the elements of the administrative exemption.

IV. ORDER

Good cause therefore appearing, IT IS HEREBY ORDERED that:

- (1) E&Y's motion for summary judgment as to the claims of Sarah Fernandez is DENIED;
- (2) A case management conference is set for March 6, 2009 at 10:30 a.m.

DATED: January 15, 2009


JEREMY FOGEL
United States District Judge

Copies of Order served on:

Anastasia Melinda Boles aboles@akingump.com, westdocketing@akingump.com

Arthur William Lazear awl@hoffmanandlazear.com

Catherine A. Conway cconway@akingump.com, thowe@akingump.com,
westdocketing@akingump.com

Christopher Blanchard cblanchard@akingump.com

Gregory William Knopp gknopp@akingump.com, dkucko@akingump.com,
westdocketing@akingump.com

H. Tim Hoffman hth@hoffmanandlazear.com

Leon Greenberg wagelaw@aol.com, leongreenberg@overtimelaw.com, wagelaw@hotmail.com

Mark R. Thierman laborlawyer@pacbell.net, kellyann@callatg.com, thier3@callatg.com,
thier4@callatg.com, thier6@callatg.com

Max Folkenflik max@fmlaw.net

Morgan Matthew Mack mmm@hoffmanandlazear.com

Ross L. Libenson , Esq rll@hoffmanandlazear.com, ross@libensonlaw.com,
ross.libenson@gmail.com

Stephanie S Der sder@akingump.com, thowe@akingump.com, westdocketing@akingump.com

Joel M. Cohn

Akin Gump Strauss Hauer & Feld LLP

1333 New Hampshire Ave NW, Ste 400

Washington, DC 20036